

**THE LABOR COMMISSION
WORKERS' COMPENSATION ADVISORY COUNCIL**

Monday, February 4, 2008 - 12:30 P.M.

**Room W125 Capitol Complex
Salt Lake City, Utah**

The following Advisory Council members were in attendance:

Ralph Astorga, President USWA Local 392
Dawn Atkin, Esq.
Thomas Bingham, President, Utah Manufacturers Association
David Bird, Esq.
Reo Castleton, SL County Fire Department
Brandt Goble, Painters and Tapers Local 77
Edward Holmes, M.D., RMCOEH
Brian Kelm, Esq.
James V. Olsen, President, Utah Food Industry Association
Jeff Rowley, Risk Manager, Salt Lake County
Richard J. Thorn, President/CEO, Associated General Contractors - Utah Chapter
Dennis Lloyd for Lane Summerhays, CEO, Workers Compensation Fund

The following Advisory Council members were excused:

Susan Kelly, Liberty Mutual
Brad Tibbitts, Property & Casualty Director, Utah State Insurance Department

Others Present:

Sherrie Hayashi - Commissioner
Alan Hennebold - Deputy Labor Commissioner
Robyn Barkdull - Labor Commission
Richard LaJeunesse - Labor Commission
Debbie Hann - Labor Commission
Mark Sanchez - Appl. Attorney
Ron Dressler - Utah Labor Commission
Linda Duvall - Utah Labor Commission
Rep. Michael Morley - Utah State Representative
Dave Davis - Utah Food Industry/Retail Merchants

WELCOME

Commissioner Hayashi brought the meeting to order at 12:30 p.m.

1. Approval of Minutes -

Jim Olsen moved that the minutes of the December 5, 2007 meeting be approved. **Rich Thorn** seconded the motion which passed unanimously.

2. Introductions of new Council Members – Commissioner Hayashi

Commissioner Hayashi introduced the new members of the Council: **Jeff Rowley** - Risk Manager, Salt Lake County replacing Kim Moulton and **Brandt Goble** - Painters and Tapers Local 77, replacing Todd

Miller. **Susan Kelly** - Liberty Mutual, replacing David Libby, is also a new member of the Council but was unable to attend the meeting.

3. H.B. 384 – Employee Obligations Related to Workers’ Compensation by Rep. Michael Morley.

Commissioner Hayashi reviewed the legislation which had been an agenda item previously for the Council. She said the bill incorporates the Labor Commission’s direct pay penalty provision and has also incorporated the King decision. The King decision involves the situation where an injured worker with a temporary disability is released for light duty, but cannot return to work because of incarceration, or other reasons such as termination due to the intentional abuse of a controlled substance, intoxication on the job, or other situations, and is collecting both medical and wage benefits. This legislation would entitle the injured worker to the medical benefits, but would not entitle them to wage benefits when the work opportunity was there, but they are unable to return to work because of incarceration or other reasons.

The **Commissioner** stated that there had been some new language added to the bill which the Council would be discussing at this meeting. The language had been a joint effort of the trial attorneys and the Labor Commission. Council members all had access to the bill and had reviewed it prior to the meeting.

Ms. Atkin expressed concern that the bill changed the Workers’ Compensation system from a no-fault system to a fault system by bringing in violations of workplace safety policies, etc, which could potentially affect all light duty cases. She said there were many problems with this bill and it goes far beyond trying to solving those for which it was intended.

Mr. Olsen stated that there were provisions in place to prevent any abuse by first requiring the employer or the employer’s insurance company to file an application for hearing with the Utah Labor Commission, Division of Adjudication, to request that the disability claim be reduced or terminated.

Mr. Kelm also expressed concern about this legislation stating it was mean-spirited and too overbroad. He felt it penalized children and families of the terminated disabled employee.

Mr. Olsen reminded council members that if an employee was not on workers’ compensation disability and was fired for any of those same reasons, he would also lose wages. He added that Workers’ Compensation is not a social welfare program and should not be treated as such.

Ms. Atkin pointed out that if an employee was not on workers’ compensation disability, and was able bodied, he/she could go out and get another job. An injured worker however, brought back on light duty, may not be able to get a job anywhere else – not because of being fired for the abuse, but because of the injury and she felt this was not right.

Mr. Dave Davis, Utah Food Industry/Utah Merchants Assn. told the Council the new provision of the bill, as stated by Mr. Olsen above, prevented abuse by employers by assigning the claim to the Adjudication Division to decide. He added no benefits would be lost until the hearing was decided. **Rep. Morley** agreed that the 3rd party issue made it palpable and provided a means to adjudicate a dispute fairly.

Mr. Kelm felt this created a hardship on the Adjudication Division which was already overworked and backlogged. He felt the bill cast a too far-reaching net when there were only a few cases which actually fit the intended scenario. He stated it was an unfair standard to place on employees and gave the employers unfair immunity.

Mr. Rowley and Mr. Bird both spoke in favor of the bill stating the 3rd party recommendation prevented abuse and added a measure of protection.

Mr. Hennebold asked that Rep. Morley consider moving the effective date of the bill to July 1, 2008 to allow the Commission time to establish the procedures and rules to support the bill. He noted at this point there was no fiscal note attached as the Commission felt the impact could be contained within the current budget. **Rep. Morley** was in agreement to delaying the effective date.

Mark Sanchez, applicant's attorney, addressed the Council expressing concern that he had six cases currently which fell under this type of scenario. He said Hispanics were particularly at risk because sometimes they don't fully understand the language resulting in confusion and conflict. He was also concerned that attorneys would not represent claimants who fell in this situation because there were no provisions for any type of attorneys' fees to be recovered making it impossible for attorneys to represent them.

MOTION: Mr. Kelm moved to kill the bill.

SUBSTITUTE MOTION: Mr. Bird moved to recommend to the Labor Commission the approval of H.B.384, with the understanding that the sponsor allow the Labor Commission to have discretion to either add language to the bill or adopt rules which establish focused procedures and address only egregious situations to prevent the bill from becoming too widespread in its scope. **Mr. Bingham** seconded the motion.

Rep. Morley stated he would agree to that suggestion for the bill.

Mr. Davis explained that lines 179-186 of the bill did allow the Labor Commission to have explicit rulemaking authority.

Mr. Rowley was concerned with the .08 alcohol content addressed in lines 125-126 of the bill and said it might be best to change that to .04 to allow for those employees who utilized a commercial driver's license in their employment. **Ms. Atkin** expressed further concern that the language did not sufficiently tie the use of alcohol back to the workplace situation and may be construed to imply alcohol use other than in the workplace.

Mr. Davis felt the language did tie back into the workplace situation and **Mr. Hennebold** cautioned against changing or putting in extra language and detail above which legislative research had already recommended in drafting the bill.

Commissioner Hayashi stated Legislative Research would be contacted and asked to make sure the language in all sections and subsections does apply to reasonable workplace rules.

Mr. Lloyd suggested inserting additional language following line 332:

(6) (g) If a preponderance of the evidence shows that successful rehabilitation is possible pursuant to a reemployment plan as prepared by a qualified rehabilitation provider and presented under Subsection 6(e), the administrative law judge shall order that the employee be denied the payment of weekly permanent total disability compensation benefits even though:

(i) the employee is incarcerated in a facility operated by or contracting with a federal, state, county, or municipal government to house a criminal offender in either a secure or nonsecure setting; or

(ii) the employee is not legally eligible to be employed because of a reason unrelated to the impairment or combination of impairments.

Ms. Atkin expressed concern on line 198 with "was" and "is" and felt the language should be changed back to "was" for more accurate clarification.

Rep. Morley stated that if there was a general consensus of the bill, language could be worked out for exact clarification.

Mr. Olsen called for the question on the substitute motion.

VOTING ON SUBSTITUTE MOTION: The motion failed because of a tie vote with **Mr. Kelm, Ms. Atkin, Mr. Goble, Mr. Castleton and Mr. Astorga** voting in the negative, and **Mr. Olsen, Mr. Bingham, Mr. Rowley, Mr. Bird and Mr. Thorn** voting in the affirmative.

Commissioner Hayashi stated there will be no action on the bill at this point. The Commissioner then asked the Council if they felt the role of the Council was effective.

Some concerns were expressed that more and more decisions of late were coming down to a split vote between labor and management, but most members felt the Council was still effective in recommending issues for workers' compensation through coming to consensus on most issues.

Commissioner Hayashi adjourned the meeting at 2:00 p.m.